PETITION NOT PRINTED

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Supreme Court of the United States

October Term, 1950

No. 559

NICHOLAS KORTHINOS,
EVANGELOS FRANGAKIS, NICHOLAS GALEOS,
KONSTANTINE MANOUSOS,
JOHN KARAGIANOS, VASILIOS STATHIS,
GEORGE LEMONIS, THEODORE ORBHANIDIS,
PANGIOTIS LAZAROU, GEORGE XENOS,
FOTIOS KATSIKAS, VASSILIOS KONTOULAS,
NICHOLAS VENIERIS,
STAVROS HADJITHERODROU,
THEOFRASTOS MELLASSARATOS,
ELEFTHERIOS ECONOMIDES AND
CONSTANTINOS FOROS,

Petitioners,

v.

S. S. NIARCHOS, AS OWNER, MICHAEL PILIAROS,
HIS AGENT, AND GERASSIMOS PANAS, AS MASTER,
ALL BEING INTERESTED IN THE OPERATION OF THE
STEAMSHIP "CAPTAIN K. PAPZOGLOU",

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the courts below have to do with the remand proceedings of this case. The opinion of the Court

of Appeals for the Fourth Circuit is reported at 185 F (2d) 716, and the opinion of the District Court, although not reported, has been printed in the Appendix to this brief at page 1. The prior opinion of the District Court is reported at 1948 A.M.C. 1676, and the prior opinion of the Court of Appeals is reported at 175 F(2d) 730. Certiorari to review the prior opinion of the Court of Appeals was sought but was denied by this court at 338 U.S. 894 and Rehearing was denied at 338 U.S. 939.

THE RECORD

At the outset it should be noted that respondents have never been served with a copy of the record in this case, as is required by Rule 38. Petitioners' only explanation of this is contained in their "Request to Dispense with Printing Petitioners' Appendices and Brief" which was filed in this cause along with the Petition for Certiorari. In this request they state that respondents have refused to stipulate as to the record. This statement is entirely inaccurate. Respondents have always been ready and willing to enter into a proper stipulation as to the record. When they received the draft of stipulation which petitioners have attached to their "request" however, they found the same unacceptable for the reasons set forth in their letter of January 18, a copy of which may be found in the appendix to this brief at page 4. Respondents' proctor, in this letter, called to the attention of proctors for petitioners exactly what it was he objected to in the stipulation as submitted, and suggested that certain changes be made. No reply was ever received to this letter. Respondents are aware of 28 USC 1916 which permits seamen to prosecute appeals without the prepayment of costs, but this statute does not excuse their failure to serve respondents with some sort of record. It is to be noted that when

certiorari was sought to review the first appeal, that respondents were served with a mimeographed record. No satisfactory reason has been offered as to why such a mimeographed record was not furnished respondents in this case. It is respectfully submitted that this fact alone should be sufficient to warrant a denial of this petition.

Because of petitioners' failure to supply respondents with a copy of the record in this case, it has become necessary for respondents to refer, in this brief, to the certified record on file in the Clerk's Office of this court. Page references to this record have been made where it has been possible to obtain the same from the index which was made up by the Clerk of the District Court.

JURISDICTION

The jurisdiction of this court is envoked under Title 28 U.S. Code, Section 1254.

QUESTIONS PRESENTED

The questions presented by petitioners are as follows:

1. Has the court below ruled, as a matter of law, that no waiting time can be allowed on the recovery of advances made contrary to 46 U.S.C. 599?

2. Was the burden on the shipowner to prove that the advances were not made contrary to 46 U.S.C. 599?

3. Has the District Court complied with the mandate of the Court of Appeals?

4. Did the Court of Appeals err in rejecting the deposition of the petitioner Stavros Hadjitherodorou which was never offered in evidence in the District Court and was not even written up until after this appeal had been commenced?

5. Did the District Court err in apportioning the costs in that court and in permitting respondents to offset the costs due them in the Possessory libel suit against the costs due by them in the wage suit?

STATEMENT OF THE CASE

At page 2 of their petition for certiorari, under the heading "Summary Statement of Matter Involved", petitioners purport to set out a brief history of the proceedings in this case. Many of the statements contained therein are erroneous, however, and the attention of the court is directed to the opinions of the courts below for an accurate statement of the essential facts.

At page 4 of the petition, it is asserted that the District Court "on remand refused to require respondent ship-owner to answer fully the first interrogatory propounded to him". An examination of the record, however, will show that no such contention was made in the District Court until June 21, 1950, the day after the final decree had been entered (R. 40). In fact, when the case was first remanded to the District Court, petitioners filed a motion for summary judgment (R. 8), in which they quoted in full respondents' answer to this interrogatory, which they had obtained in the State Court, and submitted their case on the admissions contained therein. Petitioners also assert that they were furnished no opportunity to "participate" in the entry of the findings of fact and conclusions of law of the District Court. The record will disclose, however, that the memorandum opinion of the District Court upon which these findings of fact and conclusions of law were taken was filed on April 14, 1950 (R. 26) and the findings of fact and conclusions of law were not entered until June 20, 1950 (R. 34). Nor is there anything to the statement found on page 4 of the petition that "the

uncontroverted evidence shows that at least an additional $2,050.00 has persistently been withheld from the earned wages of petitioning seamen". The *only* evidence submitted to the District Court were the wage accounts of petitioners, and, based on the information set out in these accounts, the District Court made its findings of how much was due each seaman. In so doing, petitioners were allowed the full amount of the advances on future earnings, which, from these wage accounts, appeared to have been made in the United States. It is earnestly submitted that the evidence fails to disclose that petitioners are entitled to anything more than has already been awarded them. Furthermore, this is purely a question of fact which has twice been decided against petitioners.

ARGUMENT

It is the purpose of this brief to show unto the court that this case is a routine one involving only a few questions of fact which have been twice decided against petitioners and that the petition which has been filed herein is nothing more than a final "stab in the dark" made to secure a reversal of the prior decision of the Court of Appeals, a review of which was denied by this court in 1949, 338 U.S. 894.

Summary of Argument

Following the denial of certiorari by this court, this case was remanded to the District Court for the sole purpose of ascertaining the amount of advances due on prior voyages. The only evidence submitted to the court on remand consisted of the wage accounts covering these voyages, and based on these accounts the court made its findings of how much was due each petitioner. The case was then again appealed to the Court of Appeals, which in a per curiam

opinion reported at 184 F(2d) 716, affirmed the findings of the District Court. Petitioners now assert that the Court of Appeals erred in construing its own mandate and that in so doing, it has decided a question of law in conflict with the decisions of this court, and the decisions in other circuits. None of the cases cited, however, bear out this assertion. In fact the Court of Appeals below has really done nothing more than construe its own mandate, and in so doing, it has not decided any question of law at all.

The only other question involved was whether the petitioners were entitled to "penalties" or "waiting time" under 46 U.S.C. 596 for the interval of time between the date on which the first decision of the Court of Appeals was handed down and the date that the advances on prior voyages were actually repaid. The court below, in passing on this point, found that the delay had been the result of "litigation attributable as much to appellants as to their adversaries" and denied recovery.

Petitioners complain that the court below erred in refusing to admit into evidence a deposition taken in 1948 but never written up or offered into evidence until after the case had reached the Court of Appeals for the second time. The Court of Appeals dismissed petitioners' motion in this regard as "mere trifling".

I. The Question of Whether "All Violations of 46 U.S.C. 599 are Per Se Withholdings of Earned Wages for Sufficient Cause" Within the Meaning of 46 U.S.C. 596 is Not Presented.

Petitioners, as their first reason for the allowance of a writ, state in effect that the court below has held, as a matter of law, that there can be no allowance of "waiting time" on causes of action arising under 46 U.S.C. 599. The opinion

below refutes this contention, however, and shows that the court has not had to pass on this question. In finding that "sufficient cause" existed, the court at 184 F(2d) 716, 718 says:

> ". . . The contention that the appellants are entitled to 'waiting time' under the statute is manifestly without merit since there has been no such withholding of wages without sufficient cause as to render the waiting time statute applicable. We dealt with this question in our former opinion. The delay that has since supervened has been the result of delays in litigation, attributable as much to appellants as to their adversaries."

Nor is there any conflict between the decision of the court below on this point and the decision of the First Circuit in *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F(2d) 310, 317 and the decision of the Second Circuit in *Venides* v. *United Greek Shipowners Corp.*, 168 F(2d) 681. In the *Mavromatis* case the court carefully stated that this question had not been presented:

> ". . . Libellants have made no claim for the penalty prescribed in 46 U.S.C.A. 596 as applied to the prohibited deductions on account of advances; so the matter of the penalty need not be considered in this connection."

And in the *Venides* case the only issue presented was whether waiting-time should have been allowed on "compulsory savings". No question of advances was presented. Petitioners also assert that the decision of the court below is in conflict with a prior decision of the Fourth Circuit in the *Sonderborg*, 47 F(2d) 719 (CCA4), but an examination of this decision shows that the question of waiting time on advances was not even discussed. Furthermore, even if wait-

ing time had been allowed in these cases, there would be no conflict with the decision of the Court below as the question of whether or not "sufficient cause" exists for the withholding of wages is a question that depends upon the facts of each individual case.

It is further contended by petitioners that the court below erred in refusing to allow waiting time for the period between May 17, 1949, the date of the first decision of the Court of Appeals and January 26, 1950, the date on which respondents deposited into court the amount of advances shown by the wage accounts to be due. They say that the record does not support the finding of the court below that the delay was "the result of delays in litigation, attributable as much to appellants as to their adversaries." An examination of the record, however, discloses that there is ample evidence to support this finding. Following the decision of the Court of Appeals on May 17, 1949, both petitioners and appellees applied for rehearing. Rehearing was denied on July 21, 1949 and thereafter both petitioners and respondents filed application for writs of certiorari. Certiorari was denied on December 7, 1949 and on December 9th, the mandate of the Court of Appeals issued directing the lower court to award to the petitioners the balance due on the wages of prior voyages after eliminating advances made contrary to 46 U.S.C. 599. This mandate was received in the District Court on December 10th and immediately following its receipt, proctors for respondents went to the Clerk's Office and checked the file to see if the disputed wage accounts had been returned. Upon learning that these accounts were not among the exhibits, proctors for respondents telephoned to the Clerk of the Court of Appeals requesting that said accounts be forwarded to the Clerk of the District Court where they would be available to both parties. These accounts were mailed to the District Court on December 16th and

upon their receipt in the Clerk's office, proctors for respondents obtained photostatic copies thereof which they sent to owner's representatives in New York with the request that they be supplied with the necessary funds to cover those advances which appeared to have been made contrary to 46 U.S.C. 599. As many of these accounts were written in the Greek language, it was necessary to have translations made. Upon receipt of funds from owners, proctors for respondents, on January 25, 1950, deposited in the registry of the Court, to the credit of the petitioners concerned, the amount of the advances which from the wage accounts appeared to have been made contrary to 46 U.S.C. 599, with the prayer that they be immediately paid over to the petitioners, and on January 26th, proctors for respondents presented to the District Court an order paying over these advances to the petitioners concerned. It is apparent from the above that respondents acted with the greatest of dispatch after the decision of the Court of Appeals became final on December 7, 1949. In fact, these advances were actually paid over to the petitioners nearly three months before the District Court, in its memorandum opinion, dated April 14, 1950, held that the petitioners were entitled to the same. It was on the basis of the above that both the District Court and the Court of Appeals found that there had been no withholding of wages without sufficient cause.

II. On Remand the Only Issue Before the Court Concerned What Advances Had Been Made on Prior Voyages and as to These There Has Been a Complete Accounting.

As their second reason why certiorari should be granted, petitioners assert that the courts below refused to require the shipowner to account for the wages of the seamen, and that in so doing they failed to comply with the mandate of the Court of Appeals. As pointed out by the Court below "the hearing on

remand was limited to the claims for wages on prior voyages covered by unlawful advances", and as to these claims, petitioners admitted on the first appeal that they had already obtained this information in a suit pending in the State court. It is also to be noted that after the mandate of the Court of Appeals had been received in the District Court, proctors for the seamen were apparently still satisfied with the accounting that they had received in the State court, for they quoted in full the answers to interrogatories obtained there and relied on the admissions contained therein to support a motion for summary judgment. In fact, it was not until after the District Court had rendered its opinion disposing of the case on the merits, that petitioners did anything at all to indicate that they were dissatisfied with the answers obtained in the State court. In other words, after having read the opinion of the court, and apparently being disappointed with the amounts allowed therein, petitioners, on April 19th, 1950, filed a motion asserting, for the first time, that this interrogatory had not been answered in the District Court. In view of this new turn of events and as an added precaution, respondents asked the District Judge to hold up the entry of a final decree until answers to this interrogatory could be obtained. Such answers were obtained and filed on June 14th, 1950, and the court, after waiting for six days and hearing nothing from petitioners, entered its final decree on June 20, 1950. Therefore, in view of this double disclosure, first in the State court and then in the District Court, petitioners are estopped from now claiming that there has been no accounting. Furthermore, the court below, which is the same court that remanded the case to the District Court has, after a careful examination of the record, concluded that petitioners have received all of the accounting that they were entitled to.

III. Settlements in Good Faith Having Been Made at the End of Each Voyage, the Burden Rested Upon the Seamen to Prove That the Advances Shown Therein Were in the United States Contrary to Law, and There Is Nothing to the Contrary in the Cases or Statutes Cited by Petitioners.

The wage accounts in the instant case are actually settlement sheets, and each contains the following provision just above the seaman's signature:

> "I hereby declare that I have been paid at .... on ..... and that having received all wages and other sums due me, I have no further claim against the S. S. "CAPT. K. PAPAZOGLOU", her owners, agents or managers."

There having been a settlement in good faith at the end of each voyage, these settlements must stand unless the seamen can show that an advance has been made in violation of the statute, as it is well settled that Section 599 applies to foreign vessels only to the extent that the prohibited advances were made in ports of the United States. *Sandberg* v. *McDonald*, 248 U.S. 185; *Jackson* v. *S. S. "ARCHIMEDES"*, 275 U.S. 463; *Mavromatis* v. *United Greek Shipowners Corp.*, 179 Fed. (2d) 310. In the *Mavromatis* case, which is the most recent pronouncement on this subject, the court, after quoting from Section 599 (a), expressed this burden as follows:

> ". . . Under the foregoing it is not enough to show that payments had been made on wage accounts in the course of the voyage, but the seaman must further show that a payment of wages had been made 'in advance of the time when he has actually earned the same' ".

It is true that once it has been shown that an advance has been made contrary to Section 599, that the settlement should be set aside, but it is then set aside only to the extent that advances contrary to Section 599 have been proven. That there is no question but that a heavy burden rests upon the seaman in such a case was recognized by the United States District Court for the Southern District of New York in the recent case of *Dendrinos* v. *City of New York*, 86 Fed. Supp. 688, 690.

> ". . . The signing without protest places upon them (the seamen) a very heavy burden of proving that these receipts were not in full accord and satisfaction of their claims."

The statutes and cases cited by petitioners to back up their contention that the burden is on the shipowner to prove that these advances were not made contrary to law, fail to bear out this contention. Petitioners cite 46 USCA 596, 597, 599, 600, 601, 605, 642, 701 and 702, and say that these sections place the burden on the shipowner to establish the validity of the advances. An examination of these sections, however, shows that only sections 596, 597 and 599 apply to foreign vessels, and that these sections contained no provision or even implication, that the burden shall be any different than in all other cases at law, mainly, that the burden rests on the plaintiff to prove his case. Nor is there anything to the contrary in the cases cited by petitioners, all of which are easily distinguished from the instant case.

In *Shilman* v. *United States*, 164 F(2d) 649 (CA2), Cert.den. 333 U.S. 837, *Leahy* v. *United States*, 63 Fed. Supp. 11 (ED Pa.) and *Johnson* v. *Isbrandtsen S.S. Co.*, 91 Fed. 872 (ED Pa.) the courts were concerned with the legality of deductions which had been *admitted*. And in

Schmidt v. *Pacific Mail S.S. Co.*, 209 Fed. 264 (D.C. Cal.), aff. 214 Fed. 513 (CA9), rev. on other grs. 241 U.S. 245; and *Holmes* v. *Dodge*, Fed. Cas. No. 6,637 (D.C. N.Y.) the courts were concerned with affirmative defenses; the defense in the *Schmidt* case being set-off and the defense in the *Holmes* case being an alleged payment made to a third party on behalf of the seaman.

Neither is there any conflict between the decision of the court below and the decisions of the other circuits cited by petitioners at page 11 of their petition.

IV. Petitioners Having Elected to Rely on the Answers to Interrogatories and Wage Accounts Attached Thereto, Which Were Obtained in the State Court, and Having Submitted no Additional Evidence, Are Not Entitled to Assert That They Never Submitted Their Case.

It is the contention of petitioners that the only matter which they submitted to the court on remand, was the disposition of their motion for summary judgment, and that it was error for the court to proceed with a final disposition of the case. The mandate of the Court of Appeals which was received in the District Court on December 10, 1949, was very explicit in its terms. It directed the Court below "to award the balance due on the wages of such voyages (prior voyages) when advances made in the United contrary to law" had been eliminated. Nothing further was required in order to set the remand machinery in motion. *Ira S. Bushey & Sons* v. *W. E. Hedger Trans. Co.*, 167 F(2d) 9, 12 (CCA2) (1948); cert. den. 335 U.S. 816. Instead of introducing further testimony, however, petitioners elected to rely on the discovery that they had obtained in the State court, and on December 17, 1950 they filed a motion for

summary judgment in which they quoted in full, respondents' answer to the interrogatory pertaining to advances The wage accounts referred to in this answer were already before the court, the same having been produced in the Court of Appeals on the first appeal, and then transmitted to the District Court. Respondents then deposited into court the amount of the advances, which, according to the wage accounts, appeared to have been made in the United States contrary to law and replied to petitioners' motion for summary judgment with a written memorandum in opposition to the same (Appx. p. 6). In this memorandum respondent pointed out that the remedy of summary judgment did not exist in admiralty, but that they had no objection to the issue of advances on prior voyages, being disposed of on the merits, without further oral argument. This memoradum was submitted to the court on February 22, 1950, and a copy was mailed to proctors for petitioners on this date. Notwithstanding this fact, however, petitioners took no further action until after they had received the opinion of the court, dated April 14, 1950, disposing of the case on the merits. The only action taken then was to file an additional motion on April 19, in which they stated, for the first time, that they desired that the interrogatory which had already been answered in the State court, be answered in the District Court. Respondents then, out of an abundance of caution, asked the District Court to hold up its final decree until new answers could be obtained. These answers were obtained and filed on June 14, 1950 and the Judge of the District Court, after waiting six days and not hearing anything further from petitioners, entered a final decree in accordance with his opinion of April 14th. Certainly, in view of the proceedings related above, petitioners are in no position to now claim that their case was never

submitted; and there is nothing to the contrary in *Jones* v. *St. Paul Fire and Marine Ins. Co.*, 108 F.(2d) 123, 125, (CA5), or *Zarati S.S. Co.* v. *Park Bridge Corp.*, 154 F.(2d) 377, 381 (CA2).

It is further contended by petitioners that the decision of the court below permits respondents to withhold advances of more than $2,000.00 made contrary to 46 USCA 599. They have failed, however, to set out any details of this claim and respondents do not believe that a lengthy discussion of the same is warranted since it involves nothing more than a factual issue which has been twice decided against petitioners. Furthermore, the cases cited by petitioners in support of this assertion fail to set out any doctrine of law in conflict with the decision of the court below.

V. Since the Answers to Interrogatories Filed in the District Court on June 14, 1950, Were in Substance the Same Answers Which Had Already Been Filed in the State Court, It Makes no Difference Whether the Same Be Considered as Evidence.

As heretofore pointed out, the only evidence before the District Court on remand consisted of the wage accounts which petitioners had obtained on interrogatories in the State court, and having submitted their case on the answers to these interrogatories, it is immaterial whether the answers to the interrogatories filed on June 14, 1950, which were substantially identical to the answers on file in the State court, be considered as evidence. It is also significant to note that the opinion of the District Court which contains the court's findings of fact, was filed on April 14, 1950, two months before the answers to interrogatories, which petitioners now claim were erroneously considered as evidence.

VI. The Findings of Fact of the District Court, which Have Been Concurred in by the Court of Appeals, Should Not be Disturbed by This Court.

As heretofore pointed out, the District Court based its findings of fact on the wage accounts which were first produced in the State court and then transmitted to the Court of Appeals, and these findings have been fully concurred in by the court below. Ordinarily such findings are not reviewed by the Supreme Court and this rule is applied as rigidly in an admirality case as in any other case. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 98. Furthermore, there is nothing of importance involved here to take this case out of the general rule.

VII. The Deposition of Stavros Hadjitherodrou Was Never Offered in Evidence in the District Court and Was Therefore Properly Rejected by the Court of Appeals.

It is the contention of petitioners that the Court of Appeals erred in denying petitioners' motion that the deposition of Stavros Hadjitherodrou be admitted into evidence. In denying this motion, the court below stated its reasons therefor in its opinion at 184 F.(2d) 716, 719:

> "Appellants have made a motion in this court that we admit in evidence and consider on the question of his advances on prior voyages a deposition of one of the seamen of the Papazoglou taken prior to the trial in the lower court but never tendered in that court or even written up until after this appeal had been taken. This motion is mere trifling and will be denied. The introduction of additional evidence on appeal will be permitted only in exceptional cases where the interests of justice so require and where the party presenting such evidence has exercised due diligence to present it at the earliest

possible moment. See The *Juniata* 91 U.S. 366; *Heros* v. *Cockinos* 4 Cir. 177 F.(2d) 570, 572; *Peterson Lighterage & Towing Corp.* v. *New York Cent. R. Co.* 2 Cir. 126 F.(2d) 992; *Luksich* v. *Misetich* 9 Cir. 140 F.(2d) 812, 814."

Petitioners assert that the court below erred in refusing to consider this deposition on the grounds that there was a stipulation in existence that it be included with the record on appeal. This argument was rejected by the Court of Appeals. The only stipulation in existence with reference to this deposition is correctly stated in the Clerk's Certificate appended to the two transcripts which make up this deposition. This certificate is worded as follows:

> "I, WALKLEY E. JOHNSON, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the attached transcripts of the deposition of Stavros Hadjitheodrou are those which were furnished to me to be forwarded to the Clerk of the United States Court of Appeals pursuant to agreement of counsel as set out in letters of Messrs. Vandeventer & Black, dated July 27, 1950, and September 2, 1950, attached to said transcripts."

And the two letters referred to in this certificate read as follows:

LETTER OF JULY 27, 1950

> "Today Mr. Morewitz exhibited to us a deposition of the libellant, Stavros Hadjithedrou. This deposition was taken by Mr. Morewitz sometime in the year 1948 but was not written up until a few days ago. We have agreed with Mr. Morewitz that the transcript of this deposition may be sent to the Clerk of the Court of Appeals, along with the record, and have put an en-

dorsement to this effect on the outside of the transcript. Mr. Morewitz intends to list this item in the stipulation which is to be filed in this cause covering certain correspondence. We have not agreed that this deposition is to be treated as if the same were in evidence because it was never offered in evidence, and we intend to make this clear in the stipulation.

This letter is written at this time to insure that this deposition, when presented to the Clerk, is not to be included in the official record of testimony and exhibits. We have no objection to its being sent to the Clerk of the Court of Appeals but we do not feel that it properly forms a part of the official record."

LETTER OF SEPTEMBER 2, 1950

"On July 27, 1950 we wrote to you in connection with the deposition of the libellant Stavros Hadjithedrou. It has now developed that the transcript which was exhibited to us on July 27th, which was referred to in this letter, does not contain the whole of the deposition of this man. The remainder of this deposition has now been written up, under date of August 30, 1950. We have no objection to the remainder of this deposition being sent to the Clerk of the Court of Appeals, but as set out in our letter of July 27th, it is not to be included as a part of the official record of testimony and exhibits, since it was taken over the objection of respondents and has never been offered in evidence."

In fact, the stipulation itself, which was noted on the outside of one of the transcripts, has only been quoted in part by petitioners, and if quoted in full reads as follows:

"It is agreed that this deposition may be included with the record on appeal. It is not to form a part of the official record, however, as the same was not offered in evidence."

Petitioners have offered no acceptable excuse as to why this deposition was not offered in evidence during the course of the remand proceedings which lasted from December 10, 1949, to June 20, 1950, although they knew full well that the court intended to dispose of the case on the merits. In fact, there was still ample opportunity after the District Court had rendered its opinion on April 14, 1950 and before the final decree was entered on June 20, 1950, for petitioners to have presented this deposition. The record shows, however, that this deposition was not even written up until after appeal had been taken to the Court of Appeals. No sufficient excuse having been offered why this evidence was not presented in the usual way in the District Court, the same should not now be admitted in the Supreme Court. The *Juniata*, 91 U.S. 366.

VIII. The Apportionment of Costs Was in the Sound Discretion of the District Court and That Discretion Has Not Been Abused.

As its final reason why certorari should be granted, petitioners assert that the courts below erred in awarding all costs to them. And in addition they say that the District Court erred in permitting respondents to off-set the costs due to them in the possessory libel suit against the costs due by them in the wage suit.

As to the apportionment of costs, the general rule has always been that the same lies within the sound discretion of the court. *Benedict on Admiralty,* 6th Ed., Vol. 3, Section 435, p. 229. And it is earnestly submitted that there has been no abuse of this discretion. In fact, the District Court has awarded petitioners all of their costs in that court with the exception of the costs incident to the depositions of the

two Greek legal experts, which depositions concerned only issues decided against petitioners. (R. 38) Petitioners assert that it would be grossly unjust to permit the taxing of the deposition of Dr. Clinia, respondents' legal expert, as the costs of this same deposition have also been awarded to the shipowner in the companion case of *Malevris* v. *Papadakis* (The *Virginia*). It is obvious from 28 USC 1924, however, that this presents no problem, as this section provides that before any bill of costs is taxed, the party claiming the item of costs must submit an affidavit to the effect that the item has been necessarily incurred in the case. In fact, the affidavit of costs which has already been filed by respondents in this case, seeks only one-half the cost of this deposition. Furthermore, an examination of the depositions of these two legal experts will disclose that they contain much examination and cross-examination by the petitioners which was wholly unnecessary, and the law is well established that in such a case the cost of the deposition shall be charged against the party responsible for it. *Pendleton Bros.* v. *Pearce* (*The Malcolm Baxter, Jr.*) 10 F.(2d) 692 (CA2).

As to the contention of petitioners that the action of the District Court in permitting respondents to off-set one set of costs against another violates 46 U.S.C. 601, it is significant to note that Section 601, by its express terms, applies only to the attachment or arrestment of a seaman's *wages* and does not in any way prohibit the offsetting of one set of costs against another. Furthermore, the two cases were consolidated in the District Court before the first appeal. Nor is there any conflict between the ruling of the court below on this point and any of the cases cited by petitioners.

It should also be noted that petitioners made no protest at all in the District Court as to the apportionment of, or off-

setting of, costs, even though respondents submitted to petitioners a copy of the proposed final decree on May 2, 1950, and the same was not entered until June 20, 1950.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Norfolk, Virginia,
March 22, 1951.